UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PITTSBURGH-CANFIELD CORPORATION, *et al.,	*	**CASE NUMBER 00-43394**
	*	
Debtors.	*	
	*	
**********		
	*	
WHEELING PITTSBURGH STEEL CORPORATION,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**ADVERSARY NUMBER 02-4481**
	*	
WALLOVER OIL CO., INCORPORATED,	*	
	*	
Defendant.	*	

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M E M O R A N D U M O P I N I O N

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This matter came before the Court on the Motion for Sum-mary Judgment (the "Motion") filed by Plaintiff Wheeling Pittsburgh Steel Corporation ("Plaintiff"). Defendant Wallover Oil Co., Incor-porated ("Defendant") failed to reply to the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding

through FED. R. BANKR. P. 7056, which provides in part that,

> [t]he judgment sought shall be rendered forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the

existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

D I S C U S S I O N

Facts

On November 14, 2002, Plaintiff filed a complaint to avoid preferential transfers under 11 U.S.C. § 547(b), and in the alternative, to avoid transfers without consideration, to recover avoided transfers, and to disallow claims (the "Complaint"). In the Complaint, Plaintiff seeks to recover the Three Hundred Eleven Thousand One Hundred Seventy-One and 58/100 Dollars ($311,171.58) of payments made to Defendant in the 90-day period prior to the filing of Plaintiff's voluntary petition under Chapter 11 of the Bankruptcy Code, as detailed in Exhibit A of

Plaintiff's Complaint. On June 9, 2003, Defendant filed an answer in which it asserted the affirmative defenses of contemporaneous exchange, ordinary course of business and new value pursuant to 11 U.S.C. § 547(c). Plaintiff and Defendant submitted a Joint Adversary Status Report on November 2, 2004, in which the parties posited that the primary issue in dispute would be whether any affirmative defenses were applicable.

The Case Management and Discovery Order, entered on November 19, 2004, provided that all discovery was to be completed by January 18, 2005, all dispositive motions were to be filed no later than February 28, 2005, and if such a motion was filed, the nonmoving party would have fourteen (14) calendar days to oppose such motion. On or about December 3, 2004, Plaintiff served consol-idated discovery on Defendant. Included in the discovery requests was Debtor's First Set of Requests for Admissions ("Requests for Admissions"). The Requests for Admissions asked Defendant to admit: (1) that it received the transfers identified in Exhibit A to the Complaint; (2) that it received those transfers during the preference period in satisfaction of an antecedent debt or debts that Plaintiff owed Defendant; (3) that the transfers were made for Defendant's benefit as a creditor of Plaintiff; (4) that Plaintiff was insolvent when the transfers were made; (5) that the transfers enabled Defendant to receive more than it would have received had Plaintiff been liquidated under Chapter 7; and (6) that Defendant

did not have a perfected security interest in Plaintiff's assets, which were satisfied (in whole or part) by the transfers. (Pl.'s Mot. for Summ. J., Ex. A, at Nos. 1-9.) The Requests for Admissions further asked Defendant to admit facts that defeated any affirmative defenses under 11 U.S.C. § 547(c), including that the transfers were not intended to be made contemporaneously in exchange for new value and were not actually so exchanged. (Id., Ex. A, No. 11.)

Pursuant to FED. R. BANKR. P. 7036, Defendant's responses to the Requests for Admissions were due within 30 days after service, i.e. early January. In addition, pursuant to the Case Man-agement and Discovery Order, the parties were required to complete all discovery no later than January 18, 2005. However, to date, Defendant has not answered or otherwise responded to Plaintiff's Requests for Admissions.

Legal Analysis

Section 547(b) of the Bankruptcy Code provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made--
>
> (A) on or within 90 days before

> the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was in insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chap-ter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The unopposed facts presented by Plaintiff's Motion satisfy the elements of a preferential transfer, as provided by 11 U.S.C. § 547(b), with respect to each transfer identified in Exhibit A to the Complaint.

In its Requests for Admissions, Plaintiff asked Defendant to admit facts that establish all of the elements needed to avoid a preferential transfer. Defendant failed to respond. Federal Rule of Civil Procedure 36, made applicable by operation of Bankruptcy Rule 7036, provides that,

> [t]he matter [for which an admission is requested] is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

FED. R. CIV. P. 36(a). Accordingly, by its failure to respond,

Defendant admitted every proposed fact in Plaintiff's Requests for Admissions. Defendant's admissions establish all elements of a prima facie preference claim with respect to each transfer listed in Exhibit A of the Complaint. In addition, Defendant has failed to respond to the Motion and assert any affirmative defenses. As a consequence, this Court grants Plaintiff's Motion for Summary Judgment.

An appropriate order shall enter.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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	*	
Defendant.	*	
	*	

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O R D E R

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For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this _____ day of May, 2005, addressed to:

MICHAEL E. WILES, ESQ., Debevoise & Plimpton LLP, 919 Third Avenue, New York, NY 10022.

JAMES M. LAWNICZAK, ESQ., RONALD M. McMILLAN, ESQ. and NATHAN A. WHEATLEY, ESQ., Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, OH 44114.

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SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

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JOANNA M. ARMSTRONG